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No. 91-2022

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

IN RE WASHINGTON PUBLIC POWER SUPPLY SYSTEM SECURITIES LITIGATION MDL-551

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Petitioner,

VS.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: June 15, 1992

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QUESTION PRESENTED

The question presented, which is one of first impression, is whether, pending review of an appealable remand order in a diversity action pursuant to 29 U.S.C. § 1332(a), the district courts should be required to stay implementation of remand in order that federal jurisdiction not be divested.

Specifically, petitioner presents the following narrow question: Should the Ninth Circuit's May 29, 1992 order (App. A) dissolving the District Court's April 15, 1992 order (App. D) staying implementation of the District Court's earlier remand order (App. C) be reversed pending the appeal of the remand order on the merits because, in the absence of stayed implementation of the remand order, the federal courts otherwise will be divested of jurisdiction if the remand order is later reversed.

PARTIES TO THE PROCEEDINGS

Petitioner Illinois Employers Insurance of Wausau, an Illinois corporation, is the appellant below and the defendant in the remanded action currently on appeal. Respondent Public Utility District No. 2 of Grant County, a Washington corporation, is the appellee below and the plaintiff in the remanded action currently on appeal.

Petitioner is a wholly-owned subsidiary of Wausau Service Corporation, a Wisconsin corporation. Wausau Service Corporation is a wholly-owned subsidiary of Employers Insurance of Wausau A Mutual Company, a Wisconsin corporation.

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PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Illinois Employers Insurance of Wausau, respectfully prays that a writ of certiorari issue to review a certain order entered by the Court of Appeals for the Ninth Circuit on May 29, 1992.[1]

OPINIONS BELOW

The unreported orders of the Court of Appeals appear as App. A and App. B in the Appendix. The District Court's remand order and opinion appears as App. C. The unreported opinion of the

[1] (App. A.) The Ninth Circuit denied reconsideration on June 5, 1992. (App. B.)

District Court granting a motion for stay of the remand order appears as App. D.

JURISDICTION

The order of the Court of Appeals was entered on May 29, 1992. (App. A.) A motion for reconsideration was denied on June 5, 1992. (App. B.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between—
>
> (1) citizens of different states;

28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

STATEMENT OF THE CASE

The Jurisdictional Conundrum

This case of first impression presents a significant question regarding an existing jurisdictional anomaly relating to diversity jurisdiction over a civil action during the pendency of an appeal of a remand order.

This Court has held that remand orders not made pursuant to 28 U.S.C. § 1447(c) are appealable despite the provisions of

28 U.S.C. § 1447(d). *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). The Ninth Circuit, along with a number of other circuits, in reliance upon the Court's reasoning in *Thermtron,* has held that a party has the right to appeal from a remand order based on the interpretation of a forum selection clause. *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.,* 940 F.2d 550 (9th Cir. 1991); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273 (9th Cir. 1984); *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193 (6th Cir. 1990).

The Ninth Circuit has also held that the federal courts are divested of jurisdiction to retrieve a remanded action from the state court once a remand order has been implemented. *Seedman v. U.S. Dist. Court,* 837 F.2d 413 (9th Cir. 1988). Thus, in the absence of a stay of the implementation of a remand order during appeal, federal jurisdiction may be effectively eliminated the moment the remand order is implemented.

Should that occur, a litigant such as petitioner is therefore denied: (i) its right to federal diversity jurisdiction (based on proper removal grounds) and (ii) its right to appeal from a remand order if federal courts are divested of power to intervene in state court proceedings once the remand order is reversed.

Factual Background

Petitioner issued a directors and officers liability insurance policy (the "Policy") to respondent. The Policy contained a forum selection clause. Disputes subsequently arose among the parties regarding petitioner's obligations, if any, under the Policy in light of alleged fraud in the inducement by respondent. Moreover, in consideration of the payment by petitioner of its policy limits of $5 million, the parties jointly negotiated a modification, by letter agreement, to the forum selection clause contained in the Policy.

In reliance upon the modified forum selection clause, petitioner filed a declaratory relief action against respondent in the United States District Court for the Northern District of California, Action No. C 90 2805 FMS. Respondent then filed a separate

action against petitioner in Grant County, Washington Superior Court, Action No. 90-2-00821-1. Relying on the modified forum selection clause, petitioner removed the state court action to the United States District Court for the Eastern District of Washington, Action No. CS-91-010-JLQ. The Judicial Panel on Multidistrict Litigation then transferred both the Northern District of California action and the removed Eastern District of Washington action to the Western District of Washington as part of MDL-551, as Action Nos. C-90-1639 and C-91-816, respectively.

On motion of respondent, the District Court[2] issued a remand order (the "Remand Order") on March 12, 1992 directing the return of the removed action to Grant County, Washington Superior Court. (App. C.) The Remand Order was grounded upon District Judge Browning's review and interpretation of the forum selection clause at issue. Thus, the Remand Order is appealable as a collaterally final order under 28 U.S.C. § 1291. *See, Thermtron Products, Inc. v. Hermansdorfer, supra,* 423 U.S. 336, 345 (1976); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., supra,* 940 F.2d 550, 553 (9th Cir. 1991); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., supra,* 741 F.2d 273, 276 (9th Cir. 1984); *Regis Associates v. Rank Hotels (Management) Ltd., supra,* 894 F.2d 193 (6th Cir. 1990). In reliance on these cases, petitioner filed a timely notice of appeal on March 14, 1992.

The District Court granted petitioner a stay of the implementation of the Remand Order (the "Stay Order") on April 15, 1992, pending the appeal. (App. D.) On May 29, 1992, the Ninth Circuit entered an order dissolving the Stay Order. (App. A.) The Ninth Circuit denied petitioner's motion for reconsideration on June 5, 1992. (App. B.)

If the Ninth Circuit's order dissolving the Stay Order is not reversed and the Stay Order is not reinstated, the clerk of the District Court will send the action back to the state court pursuant to the Remand Order. Then, if the Ninth Circuit

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[2] The Honorable William D. Browning of the District of Arizona, sitting by designation in *In re Washington Public Power System Securities Litigation,* MDL-551.

reverses the Remand Order, it will have no ability to retrieve the action from state court if the remand is first effectuated. No federal court will then have jurisdiction to intercede in the state court action. *Seedman v. U.S. Dist. Court, supra,* 837 F.2d 413 (9th Cir. 1988). Hence, if the Ninth Circuit's dissolution order is not reversed, petitioner will suffer irreparable harm in that it will be effectively denied its right to proceed in a federal forum.

REASONS FOR GRANTING THE WRIT

There is no dispute that federal diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) exists in the pertinent action. This statutory grant of federal jurisdiction is jeopardized by the Ninth Circuit's order dissolving the District Court's stay of remand pending appeal of the Remand Order.

The right to appeal from the Remand Order based upon the interpretation of a forum selection clause, expressly allowed by the Ninth Circuit, may be effectively mooted by the dissolution of the Stay Order. Allowing implementation of the Remand Order pending appeal of that order may effectively divest the federal court of jurisdiction to reobtain the remanded action once it has been returned to the state court. This is true even if the Ninth Circuit determines that the Remand Order was erroneous. *Seedman v. U.S. Dist. Court, supra,* 837 F.2d 413 (9th Cir. 1988).

This Ninth Circuit conundrum must be resolved in order to preserve the exercise of federal diversity jurisdiction. Petitioner contends that this can only be done by reversing the Ninth Circuit's order dissolving the Stay Order.

Petitioner's writ should be granted, moreover, because petitioner's likelihood of success in its Ninth Circuit appeal of the Remand Order (based upon the modified forum selection clause) is substantial. First, this Court is likely to accept the Ninth Circuit's decisions holding that remand orders based upon the interpretation of a forum selection clause are reviewable on appeal. *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., supra,* 940 F.2d 550 (9th Cir. 1991); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., supra,* 741 F.2d 273 (9th Cir. 1984). In those decisions, the Ninth Circuit applied the Court's

rationale in *Thermtron Products, Inc. v. Hermansdorfer, supra,* which created an exception to the general rule prohibiting appeals of remand orders.[3] Second, the Court is also likely to view petitioner's pending appeal favorably based upon the Court's decisions validating the enforceability of forum selection clauses. *See, Carnival Cruise Lines, Inc. v. Shute,* ____ U.S. ____, 111 S. Ct. 1522, 113 L. Ed.2d 62 (1991); *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972). Petitioner intends to demonstrate on appeal that the modified forum selection agreement negotiated between the parties precludes the District Court's remand.

In summary, if this Court does not reverse the Ninth Circuit's order (App. A) pending resolution of the appeal of the Remand Order, petitioner is effectively denied its right of appeal and the federal courts are deprived of jurisdiction to effectuate a reversal of the erroneous order of remand.

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[3] There, the Court held that review of a remand order is available by mandamus when remand is explicitly based on grounds other than those specified in 28 U.S.C. § 1447(c).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the order of the Court of Appeals for the Ninth Circuit dissolving the stay of the District Court's Remand Order pending appeal.

Respectfully submitted,

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Dated: June 15, 1992

Appendix A

United States Court of Appeals
For the Ninth Circuit

[Filed May 29, 1992]

No. 92-35272

DC# CV-91-816-WDB
Western Washington (Seattle)

Public Utility District No. 2 of Grant County,
Plaintiff-Appellee,

v.

Illinois Employers Insurance of Wausau,
Defendant-Appellant.

ORDER

Before: Farris, Thompson and Fernandez, Circuit Judges

Appellee's motion to dissolve the district court's order granting a stay pending appeal is granted. The district court applied an incorrect legal standard to appellant's application for stay. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), does not require that all appealable remand orders be automatically stayed pending appeal without reference to the standards reiterated by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770 (1987). We were simply balancing the policy concerns addressed by 28 U.S.C. § 1447(d) against the concerns raised by a remand order that is based on the merits of the parties' claims rather than jurisdiction.

Applying the stay factors in *Hilton*, 481 U.S. at 776, we find that no stay is warranted. *See Foster v. Chesapeake Ins. Co., Ltd.*, 993 F.2d 1207 (3d Cir), *cert denied*, 112 S.Ct. 302 (1991); *Perini Corp. v. Orion Ins. Co.*, 331 F.Supp 453 (E.D. Cal. 1971).

The briefing schedule established March 19, 1991 shall continue in effect.

Appendix B

United States Court of Appeals
For the Ninth Circuit

[Filed June 5, 1992]

No. 92-35272

DC# CV-91-816-WDB
Western Washington (Seattle)

Public Utility District No. 2 of Grant County,
Plaintiff-Appellee,

v.

Illinois Employers Insurance of Wausau,
Defendant-Appellant.

ORDER

Before: Farris, Thompson and Fernandez, Circuit Judges

Appellant's emergency motion for reconsideration of this court's May 29, 1992 order dissolving the stay pending appeal is denied. Appellant's reliance on *Seedman v. U.S. District Court*, 837 F.2d 413 (9th Cir. 1988), is misplaced. That case held that 28 U.S.C. § 1447(d) bars reconsideration, as well as appellate review, of a remand order based on lack of federal jurisdiction. The order challenged in this appeal is not based on jurisdiction and, consequently, is not subject to the restriction imposed by section 1447(d).

Appendix C

In the United States District Court

For The Western District of Washington

Case No. MDL-551

No. C-90-1639
(Browning)

[Filed March 14, 1992]

In Re Washington Public Power
Supply System Securities Litigation,

Illinois Employers Insurance of Wausau,
Plaintiff,

v.

Public Utility District No. 2 of Grant County,
Defendant.

Public Utility District No.2 of Grant County,
Plaintiff,

v.

Illinois Employers Insurance of Wausau,
Defendant.

No. C-91-816
(Browning)

ORDER

Pending before the Court are: (1) Illinois Employers Insurance of Wausau's ("Wausau") Motion to Dismiss or Stay Grant County's action; (2) Public Utility District No. 2 of Grant County's ("Grant County") Motion to Dismiss or Stay Wausau's action; and (3) Grant County's Motion for Remand. For the

following reasons, Wausau's Motion will be denied and Grant County's Motions will be granted.

OPINION AND ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a declaratory judgment action where an insurer (Wausau) seeks to avoid liability for a Public Utility District's ("PUD") (Grant County) participation in the WPPSS debacle. The problem is that two virtually identical lawsuits have been filed.

Grant County was sued by bondholders and Wausau funded a settlement with full policy limits, reserving its rights to litigate coverage. On September 28, 1990, Wausau filed Case No. C-90-1639 in United States District Court for the Northern District of California ("Wausau's action"). [1] Wausau's action was designated a "tag-along action" to MDL-551 and transferred without objection to Arizona. Grant County, however, was served after the case was transferred and, thus, had no opportunity to object.

In December 1990, before it was served, Grant County filed its action, now styled Case No. C-91-816, in Superior Court of Washington for Grant County seeking a declaration of rights under the same policy ("Grant County's action"). Wausau removed that action to the United States District Court for the Eastern District of Washington. Grant County's action was then "conditionally transferred" to this Court by the Judicial Panel on Multidistrict litigation ("MDL Panel"). Grant County filed an objection to the transfer. The MDL Panel was not persuaded by Grant County's arguments in opposition and transferred the action to this Court for all pretrial proceedings. The MDL Panel stated:

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[1] In the Wausau action, Wausau seeks to recover the amounts it paid on behalf of Grant County because: (1) Grant County had knowledge of facts underlying the action; (2) the policy otherwise excluded coverage; and (3) Grant County breached the implied covenant of good faith and fair dealing.

> On the basis of the papers filed and the hearing held, the Panel finds that *Grant County* involves common questions of fact with actions previously transferred to the Western District of Washington, and that transfer of *Grant County* to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring in this docket will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. We emphasize that transfer is particularly appropriate because *Grant County* and an action already included in the centralized proceedings (*Wausau v. Grant County*) both concern disputed coverage under the same insurance policy between the same two parties.

June 6, 1991 MDL-551 Transfer Order.

The parties have both moved to dismiss the other's action or, in the alternative, stay it. In addition, Grant County moves for remand of its action to state court. The parties' dispute arises from the application of forum selection clauses contained in: (1) the insurance contract; and (2) a subsequent letter agreement addressing forum selection as part of Wausau's funding of Grant County's settlement.

II. THE LAW

A. Forum Selection Clauses

Applying *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the United States Court of Appeals for the Ninth Circuit has held that forum selection clauses are procedural in nature and, therefore, federal law applies. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). The law is straightforward as set out by the *Manetti-Farrow court*:

> Forum selection clauses are *prima facie* valid and are enforceable absent a strong showing by the party opposing the clause "that enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reason as fraud or overreaching." The opposing party has the burden "to show that trial in the contractual forum would be so gravely

> difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

Manetti-Farrow, 858 F.2d at 514-15 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)) (citations omitted).

B. Staying an Action

It is well within the Court's discretion to stay proceedings. *See, e.g., Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979). The Leyva court addressed whether a stay was proper in the face of parallel arbitration proceedings. It observed:

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character and does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Leyva, 593 F.2d at 863-64.

III. WAUSAU'S MOTION

A. Duplicative Federal Proceedings

Wausau argues, on efficiency grounds, that Grant County's action should be dismissed or stayed because the Wausau action, filed first, involves the same parties, policy, and coverage issues. Wausau treats the actions as duplicative federal actions without acknowledging the state court origin of the Grant County action. To support its contention, Wausau quotes the United States Supreme Court's statement that "[a]s between federal district courts, . . . though no precise rule has evolved, the general principal is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Because Grant County's action was filed last, Wausau argues that it should be dismissed. *See Pumpelly v. Cook*, 106 F.R.D. 238 (D.D.C. 1985); *Donaldson, Lufkin & Jenrette v. Los Angeles County*, 542 F.Supp. 1317 (S.D.N.Y 1982).

Another argument based on judicial economy is that Grant County's action should be dismissed because the issue in Wausau's action, whether the policy is void *ab inito*, must be decided before the Grant County's coverage issues. Wausau argues that parallel actions entail the risk of inconsistent rulings.

B. Compulsory Counterclaims

Wausau also argues that Grant County's claims are compulsory counterclaims under Fed.R.Civ.P. 13(a), and thus should be asserted in Wausau's action rather than in a separate lawsuit. According to Wausau, as a subsequent action based on compulsory counterclaims, Grant County's suit should be dismissed.

C. First to File Rule

Furthermore, Wausau claims that the "first to file" rule supports the dismissal or stay of Grant County's action. Under this doctrine of federal comity, a district court may decline jurisdiction over an action when a similar suit involving the same parties and issues has been filed in another district. *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94 (9th Cir. 1982).

D. Colorado River Deference

Finally acknowledging the origin of Grant County's suit, Wausau argues that its dismissal does not violate the *Colorado River* deference doctrine. *See Colorado River; Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633 (9th Cir. 1989). *Colorado River* requires deference only in "exceptional circumstances." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983).[2] Because the doctrine is not based on weighty

[2] Factors supporting deference are: (1) whether either court has assumed jurisdiction over a *res*; (2) the relative convenience of the forums; (3) the desireability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) whether the state proceeding is adequate to protect the parties' rights; (7) the substantial similarity and parallel or "spinoff" nature of the state proceeding; and (8) whether a party is attempting to forum shop. *Nakash v. Marciano*, 882 F.2d 1411, 1415-17 (9th Cir. 1989). Wausau, of course, argues that the application of these factors to the instant matter does not favor deference.

considerations of federalism and comity but on the efficient use of judicial resources, Wausau argues that the doctrine does not require the Court tc defer Wausau's suit to that of Grant County. *See American Int'l Underwriters, Inc. v. Continental Ins. Corp.*, 843 F.2d 1253, 1257 (9th Cir. 1988); *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989).

E. April 14, 1988 Letter Agreement

At last, Wausau addresses the competing forum selection agreements. While Wausau acknowledges that the forum selection clause in the policy may have applicability to the Wausau action in other circumstances, it argues that the clause has been replaced by the *subsequently* negotiated clause made as part of the funding settlement agreement. That provision was memorialized in an April 14, 1988 letter drafted by Grant County's attorney,[3] which states:

> This confirms that at 9:30 a.m. this morning Wausau agreed to fund Grant's share of the Mid-Columbia settlement to the full extent of the remaining limits of the above referenced policy, in the settlement of the claims brought by the Class Plaintiffs and Chemical Bank, as Bond Fund Trustee, in MDL No. 551. Wausau and Grant have agreed that Wausau's funding of this settlement is made with a full reservation of rights by both Wausau and Grant. Should Wausau decide to pursue any claims against Grant relating to this settlement, those claims may be filed either in state or federal court in San Francisco, or in state or federal court in Spokane, Washington.

See Exhibit "A" (letter from Michael F. Perlis) (attached to Grant County's Consolidated Memorandum).

The April 14, 1988 letter, argues Wausau, constitutes a binding and enforceable forum selection agreement. Wausau states that the policy's forum selection clause does not waive Wausau's right to removal. According to Wausau, this clause only mandates forums for suits by the insured against the insurer for failure to

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[3] Michael Perlis was the attorney who had been retained to negotiate the terms on behalf of all the PUDs.

pay claims. Thus, it argues that its declaratory judgment action for noncoverage is outside the scope of the policy forum selection clause.

F. Policy Forum Selection Clause Unenforceable

Finally, Wausau asserts that the policy clause, even if it does waive Wausau's right of removal, cannot be enforced under these circumstances. It contends that judicial economy and Wausau's right to an impartial forum mitigates against the enforcement of the clause. Furthermore, Wausau argues that Grant County is estopped from asserting the clause because of their assent to the April 14, 1988 letter agreement.

IV. GRANT'S MOTIONS

A. Policy Forum Selection Clause Enforceable

Grant County argues that the Wausau action should be dismissed because Grant County has a right to choose the forum under the forum selection clause found in the insurance contract. That forum selection clause states:

> [I]t is agreed that in the event of the failure of the [Wausau] to pay any amount claimed to be due hereunder, *[Wausau], at the request of the [Grant County], will submit to the jurisdiction of any court of competent jurisdiction within the United States and comply with all requirements necessary to give such court jurisdiction.* . . . It is further agreed . . . that in any suit instituted against [Wausau], upon this contract, [Wausau] will abide by the final decision of such court or of any appellate court in the event of an appeal.

See Grant County's Consolidated Memorandum, at 7 (quoting Wausau Policy, at para. VII(j) (emphasis added).

The forum selection clause, argues Grant County, gives it the right to select its forum and, absent a strong showing that its enforcement is unjust, mandates this Court's dismissal or stay of Wausau's case. Grant County states that similar language "has consistently been held to constitute a waiver, by the insurer, of its right to remove an action from state court to federal court."

Cessna Aircraft Co. v. Fidelity and Casualty Co., 616 F.Supp. 671, 673-74 & n.1 (D.N.J. 1985).

In *Cessna*, a case very similar to the instant matter, the insurer funded a settlement and then filed a lawsuit against its insured seeking a declaration of rights under the policy. *Cessna*, 616 F.Supp at 673. The insured filed a second, identical lawsuit in state court and moved to dismiss or to stay the federal court action based on a forum selection clause.

The *Cessna* court rejected the insurer's argument that the forum selection clause did not effect the insurer's right to bring an action where it chose. *Id.* at 674. Similarly, the court rejected the insurer's argument that the forum selection clause did not encompass a declaratory judgment action.[4] *Id.* Accordingly, the court stayed the action. *Id.* at 675-76. Applying *Cessna*, Grant County argues that its action should be remanded and this Court should dismiss the Wausau action.

Grant County attacks Wausau's motion on two fronts. First, it argues that the April 14 letter specifically preserves all of Grant County's policy rights, including its right to choose its forum. Second, Grant County notes that the April 14 letter addresses only Wausau's choice of forum and does not restrict Grant County's choice of forum.

In addition to the plain language of the April 14 letter agreement, Grant County cites the deposition of Michael F. Perlis as support for Grant County's construction of the agreement. In that deposition, Mr. Perlis stated that Grant County did not intend to waive any of its policy rights regarding venue. See Transcript of March 5, 1991 Michael F. Perlis Deposition, at 55.

Moreover, Grant County characterizes Wausau's waiver argument as prompted by Wausau's desire to take advantage of this Court's November 21, 1990 Order in *Illinois Employers Ins. of Wausau v. Public Util. Dist. No. 1 of Cowlitz County*, Case No.

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[4] The insurer argued that the clause was inapplicable because it gave the insured the right to choose the forum when disputes arose over the insurer's refusal to pay. Here, the insurer did pay through the funding of the settlement agreement.

C900053. Because of Wausau's success with a forum selection agreement negotiated during settlement with Cowlitz County PUD, argues Grant County, Wausau is attempting to turn the less specific April 14 letter into the explicit forum selection agreement negotiated in the Cowlitz funding settlement. Grant County notes that Wausau made no mention of the April 14 letter when Grant County filed its action or when Wausau removed it. Wausau unveiled the waiver argument for the first time in opposition to Grant County's motion to remand.

Substantively, Grant County argues that the policy clause and the April 14 letter are not mutually inconsistent. According to Grant County, the April 14 letter governs suits by Wausau for declaratory relief while the policy clause governs suits filed by Grant County against Wausau for failure to pay claims.

B. Judicial Economy

Alternatively, Grant County argues that "judicial economy" requires stay of the Wausau action. This Court should look at: (1) which action is more comprehensive (to avoid piecemeal litigation); (2) which action is more convenient; (3) the substantive law to be applied; and (4) prejudice. *General Reins. v. CIBA-Geigy Corp.*, 853 F.2d 78, 81-81 (2d Cir. 1988). Here, argues Grant County, its action is the better case to litigate these issues.

First, Grant County argues that its action encompasses all issues raised in both lawsuits while the Wausau action does not.[5] Second, it argues that its action has been more diligently pursued. Third, it argues that the its action is more convenient. Fourth, it notes that Washington state law claims are being raised in both lawsuits. Finally, Grant County argues that Wausau will not sacrifice any rights because state law is applied in either forum.

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[5] According to Grant County, Wausau's suit only covers whether Wausau's policy covers Grants claims arising out of MDL-551. The Grant County action adds the question of whether the policy covers the *Haberman* action and whether Wausau's conduct violated Washington law.

C. Washington Superior Court as an Impartial Forum

Remand to a Washington state forum, according to Grant County, would not result in Wausau being denied a meaningful day in court. Grant County maintains that this is a different case, time, and juror pool from the MDL-551 proceedings in which this Court found Washington state forums to be biased. It argues that, under *Manetti*, Wausau cannot rely on an unsupported allegation of the unfairness of a forum to render a valid forum selection clause unenforceable. *Manetti*, 858 F.2d at 514-15.

D. Colorado River Deference

In opposition to Wausau's *Colorado River* argument, Grant County argues that the exceptional circumstances, required for a federal court to retain jurisdiction, do not exist in declaratory judgment cases. *See Terra Nova Ins. Co., Ltd. v. 900 Bar*, 887 F.2d 1213, 1222 (3d Cir. 1989). The Ninth Circuit has adopted this approach. *See Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1253-55 & n.4 (9th Cir. 1987). The United States Supreme Court has stated that:

> [I]t would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit while another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Brillhart v. Excess Ins., 316 U.S. 491, 49S (1942).

In *DiGregorio*, the Ninth Circuit rejected the insurer's *Colorado River* argument that the doctrine limited the district court's discretion to dismiss the insurer's first-filed federal suit. *DiGregorio*, 811 F.2d at 1255[6] Grant County argues that the

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[6] The Ninth Circuit based its holding on the following factors: (1) all the issues raised in the insurer's prior federal suit could be litigated in state court; (2) many of the issues raised in the state court actions—e.g. those relating to the insured's state law bad faith claim—were appropriate for state court resolution; (3) no compelling federal interest was at stake; (4) the insurer's federal suit was not too far advanced; and

factors cited in *DiGregorio* support the dismissal of Wausau's action.

VI. DISCUSSION

The outcome of these motions depends on the construction of the different forum selection provisions in the policy and the April 14 letter agreement. If Wausau is correct that the April 14 letter waived Grant County's right to require Wausau's submission to jurisdiction in a forum of Grant County's choosing, then there would be two parallel federal proceedings. Then, Wausau's "first to file" and compulsory counterclaim case law would support the dismissal or stay of Grant County's action. If, however, Grant County is correct that the April 14 letter did not revive Wausau's right to remove, then there would be parallel federal and state proceedings. Then, removal of Grant County's action would be improper, and remand would be appropriate.

The forum selection clause in the policy clearly waives Wausau's right to remove actions filed by Grant County against Wausau for failure to pay claims. *See Cessna*, 616 Supp. at 674, and cases cited therein. The plain language of the April 14 letter grants Wausau the right to file a declaratory judgment action against Grant County in either San Francisco or Spokane. It also, however, unambiguously reserves all of Grant County's rights under the policy. The right to require Wausau to submit to the jurisdiction of any court of competent jurisdiction, and thus Wausau's waiver of the right to remove, is one of the rights reserved to Grant County under the April 14 letter. Thus, there are two forum selection clauses that are valid and enforceable. They are not, however, mutually inconsistent. That the April 14 letter does not extract much from Grant County in exchange for Wausau's funding of the settlement of the MDL-551 claims is insufficient to create a waiver of Grant County's rights under the policy's forum selection clause.

Because the Court concludes that the April 14 letter does not render the policy's forum selection clause null and void, Wausau's

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(5) the insurer did not face potentially conflicting obligations. *DiGregorio*. 881 F.2d at 1255.

removal of Grant County's state court action was improper. Under *The Bremen*, these forum selection clauses are unenforceable. *The Bremen*, 407 U.S. at 10. The Ninth Circuit held that these clauses are enforceable "[a]bsent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court. . . ." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984).

Wausau drafted this clause. Thus, no fraud, undue influence, or overweening bargaining power can be shown. Also, it will not be more inconvenient for Wausau, a national insurance company, to litigate in Washington rather than in Arizona. However, if it could be shown that state court judges and juries cannot be trusted to try this case impartially, then under *Manetti* and *Pelleport*, then the forum selection clause might be unenforceable.

Although it seems logical that Washington citizens will still retain some vestigial animus towards the insurers, and preference for their own financial interests, the Court cannot conclude that Wausau would be denied a fair trial in the state courts of Eastern Washington. The Court's conclusion hinges on the lack of evidence of bias introduced by Wausau. The party opposing the enforcement of a valid forum selection clause has the burden of submitting evidence establishing the lack of impartiality. *Manetti-Furrow*, 858 F.2d at 515; *Pelleport*, 741 F.2d at 280. Wausau has had almost a year in which to do so. Wausau has relied on the fact that the potential jurors in this case are ratepayers, and on this Court's findings based on the underwriters' survey reports that MDL-551 could not be fairly tried in Seattle. At oral argument, counsel admitted that Wausau had no empirical evidence of bias in the juror pool of Eastern Washington. Wausau, therefore, has failed to carry its burden of demonstrating that it would be denied "a meaningful day in court." *Pelleport*, 741 F.2d at 280.

This result leaves the Court with parallel federal and state actions. The Ninth Circuit has recently set forth some principles to guide a district court when faced with the question of whether it should exercise its discretion to grant declaratory relief during

the pendency of a parallel state court action. *Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1370-74 (9th Cir. 1991). Abstention in the context of declaratory relief falls under the *Brillhart* doctrine. *Id.* at 1369. Based on the *Brillhart* factors,[7] the Ninth Circuit held that the district court erred by exercising its jurisdiction to grant declaratory relief in light of a parallel state court proceeding. *Robsac*, 947 F.2d at 1368.

The court of appeals stated that "when a state court action is pending presenting the same issue of state law as is presented in a federal declaratory suit, 'there exists a presumption that the entire suit should be heard in state court.'" *Id.* at 1370-71 (quoting *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366 (9th Cir. 1991)). In analyzing the first *Brillhart* factor, the Ninth Circuit found that when the sole basis of jurisdiction is diversity of citizenship, and when the "case involves insurance law, an area that Congress expressly left to the states through the McCarran-Ferguson Act," 15 U.S.C. § 1011-12 (1988), "the *Brillhart* policy of avoiding unnecessary declarations of state law is especially strong" because "the federal interest is at its nadir." *Robsac*. 947 F.2d at 1371.

Next, the court of appeals stated that "[w]hether the federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* Principal." *Id.* at 1372-73. Finally, the Ninth Circuit concluded that because all of the issues presented by the declaratory judgment action could be resolved by the state court, permitting it to go forward would be a waste of judicial resources in violation of the third *Brillhart* factor. *Id.* at 1373.

The Court finds that an analysis of the *Brillhart* principles, in this case, also favors abstention. The Court, however, will stay

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[7] *Brillhart's* holding was based on three principal rationales: (1) the avoidance of needless determinations of state law; (2) the discouragement of the use of the Declaratory Judgments Act as a means of forum shopping; and (3) the avoidance of duplicative litigation. *Chamberlain v. Allstate Ins. Co.* 931 F.2d 1361, 1367 (9th Cir. 1991).

Wausau's action rather than dismiss it. A stay of the case is the better approach because the Court retains jurisdiction to hear the case if the state court proceeding is shown to be biased. *Attwood v. Mendocino Coast Dist. Hosp.* 886 F.2d 241, 243 (9th Cir. 1989) (In reversing a district court's dismissal of a federal suit pursuant to the *Colorado River* doctrine, the court of appeals held that the district court should have stayed the matter rather than dismissing it to ensure "that the federal forum will remain open if 'for some unexpected reason the state forum does turn out to be inadequate.' ").

The Court will not address the arguments concerning *Colorado River* deference, the "first to file" rule, or cases relying on Fed.R.Civ.P. 13(a). The forum selection clause aspect of the case takes it out of the realm of *Colorado River* deference. More importantly, perhaps, the Ninth Circuit has recently made it clear that the *Colorado River* deference doctrine does not apply where the Declaratory Judgments Act is involved. *Robsac*, 947 F.2d at 1369; *Chamberlain*, 931 F.2d at 1366. The "first to file" and compulsory counterclaim case law support the dismissal or stay of Grant County's action only if the Court finds that Grant County's action was properly removed. In this case, it was not.

CONCLUSION

At bottom, the Court cannot conclude that Grant County waived its right to enforce the policy forum selection clause given its express reservation of rights under the policy in the April 14 letter. Moreover, the letter agreement did not revive Wausau's right to remove that it had waived in the policy's forum selection clause. Wausau failed to establish that litigating Grant County's action in state court would deny it a fair trial. Thus, Grant County's action was improperly removed. The Court, therefore, will remand the case to the Superior Court of Washington for Grant County. This Court, however, will stay rather than dismiss Wausau's action because a stay will ensure that a federal forum is available if the state courts of Eastern Washington "turn out to be inadequate." *Attwood*, 886 F.2d at 243.

Accordingly, IT IS ORDERED that the action filed by Public Utility District No. 2 of Grant County, No. C-91-816, is REMANDED to the Superior Court of Washington for Grant County.

IT IS FURTHER ORDERED that the action filed by Illinois Employers Insurance of Wausau, No. C-90-1639, is STAYED pending the outcome of the state court action.

IT IS FURTHER ORDERED that, beginning on August 17, 1992, and every six months thereafter, counsel for Grant County shall submit to this Court, and to opposing counsel, a brief report concerning the status of the Grant County action. Additionally, at such time as that case is resolved, counsel for Grant County shall notify this Court in writing.

Dated this 12th day of March, 1992.

William D. Browning
U.S. District Court

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Appendix D

In the United States District Court
For The Western District of Washington

Case No. MDL-551

No. C-90-1639
(Browning)

[Filed April 17, 1992]

In Re Washington Public Power
Supply System Securities Litigation,

Illinois Employers Insurance of Wausau,
Plaintiff,

v.

Public Utility District No. 2 of Grant County,
Defendant.

Public Utility District No. 2 of Grant County,
Plaintiff,

v.

Illinois Employers Insurance of Wausau,
Defendant.

No. C-91-816
(Browning)

ORDER

Pending before the Court is Illinois Employers Insurance of Wausau's ("Wausau") Application for Stay of Remand Order Pending Appeal. For the following reasons, the Court will grant the Application.

. . . .

OPINION AND ORDER

The Court recently ordered the remand of one or two virtually identical declaratory judgment actions, *Public Utility District No. 2 of Grant County v. Illinois Employers Ins. of Wausau,* No. C-91-816, to state court. Now, Wausau has applied for a stay of the Court's remand order pending its appeal to the United States Court of Appeals for the Ninth Circuit. Public Utility District No. 2 of Grant County ("Grant County") opposes Wausau's Application.

I. Law

The decision regarding a stay pending appeal is governed by the analysis set forth in *Hilton v. Braunskill,* 481 U.S. 770 (1987). There, the United States Supreme Court enumerated the determinative factors, as follows:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Braunskill, 481 U.S. at 776. The Supreme Court, however, cautioned that because the "factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.* at 777. Furthermore, the factors need not be given equal weight. *Standard Havens Prod., Inc. v. Gencor Indus., Inc.,* 897 F.2d 511, 512 (Fed. Cir. 1990). Thus, "[i]n considering whether to grant a stay pending appeal, this court assesses movant's chances for success on appeal and weighs the equities as they affect the parties and the public." *E.I. DuPont de Nemours & Co. v. Phillips Petroleum,* 835 F.2d 277, 278 (Fed. Cir. 1987).

The likelihood of success on appeal, therefore, is somewhat of an elastic concept. "When there 'is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success[,]' then '[a]n order maintaining the status quo is appropriate." *Standard Havens,* 897 F.2d at 512-13 (quoting *Washington Metro. Area Transit Comm'n v.*

Holiday Tours, 559 F.2d 841, 844 (D.C. Cir. 1977)). A stay is appropriate where the movant "'establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a *substantial* case on the merits,' provided the other factors militate in movant's favor." *Standard Havens,* 897 F.2d at 513 (quoting *Braunskill,* 481 U.S. at 778) (emphasis in original). Thus, if the harm resulting from a refusal to stay the order is "sufficiently serious, it is only necessary that there be a *fair chance* of success on the merits." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975) (applying the factors in preliminary injunction case) (*quoting C. Tennant & Sons v. New York Terminal Conference,* 299 F.Supp. 796, 799 (S.D.N.Y. 1969)) (emphasis added).

II. Discussion

The *Braunskill* analysis puts the Court in an awkward position of gauging the likelihood of success at the Ninth Circuit of the same arguments that failed to impress the Court here. The Court has been over this ground recently. Therefore, no detailed discussion is necessary.

Although it is not clear that Wausau's appeal has a substantial likelihood of success, it does raise arguable issues. However, the Court finds the equities balanced. Wausau put on no proof that it would be prejudiced by allowing Grant County to proceed in state court. Both sides will experience added delay and expense if the Court stays its remand order. Finally, Wausau's right to appeal is not foreclosed by a refusal to grant a stay.

Nonetheless, the Court will grant Wausau's Application. Remand orders based exclusively on jurisdictional grounds may not be appealed here because "Congress decided that in cases begun in state court, lengthy delays occasioned by federal appeals over jurisdictional issues are unacceptable." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273, 277 (9th Cir. 1984). The Ninth Court, however, further stated:

> But where a district court bypasses the jurisdictional arguments and reaches the merits of a contract dispute, the policy

> is inapplicable. *Any delay caused by an appeal of the contract issue is a delay that must be countenanced.*

Id. (emphasis added). This is such a case. Therefore, the Court concludes that the remand order should be stayed pending Wausau's appeal.

CONCLUSION

Accordingly, IT IS ORDERED Wausau's Application for Stay of Remand Order Pending Appeal is GRANTED.

Dated this 15th day of April, 1992.

William D. Browning
U.S. District Judge

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